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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

S. B. HANNA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JOHN MAYES,
REX W. PERKINS,
G. T. SULLINS,
CHARLES D. ATKINSON,
Counsel for Appellee.

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No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
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vs.

S. B. HANNA.
Appellee.

OPPOSING STATEMENT BY APPELLEE AS TO BASIS OF JURISDICTION AND MOTION TO DISMISS THE APPEAL.

Pursuant to Rule 12, subdivision 3, of the General Rules of the Supreme Court of the United States, appellee files this, his statement of grounds making against the assertion of jurisdiction by the United States Supreme Court in the premises.

It appears from the record of the judgment and cause sought to be reviewed herein as well as by the statement as to the basis of jurisdiction filed by appellant herein, that no Federal question was involved or decided, inasmuch as said judgment was rendered by the trial court in the first instance, and affirmed by the Supreme Court of Arkansas, pursuant to the verdict of the jury, based solely upon the factual issue of discrimination, wherein was contained no

Federal question of any nature whatsoever; and therefore no jurisdiction exists in this Court, no matter how invoked, to review the said judgment.

That no treaty or statute of the United States was declared invalid; and no statute of any State was declared valid in the face of any attack thereon on the ground of its being repugnant to the Constitution, treaties or laws of the United States; and, therefore, under the provisions of Title 28, U. S. C. A., Section 344 (a), no jurisdiction for review of said judgment exists in this Court.

That there was not drawn into question the validity of any treaty or statute of the United States, nor of any statute of any State on the ground of its being repugnant to the Constitution treaties or laws of the United States; nor was there specially set up or claimed by either party hereto any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and, therefore, under the provisions of Title 28, U. S. C. A., Section 344 (b), no jurisdiction for a review of said judgment exists in this Court.

Appellee is not unmindful of the fact that by the simple assertion of the non-existence of a Federal question in this case, he has practically exhausted his persuasive powers in this respect. The case is now before this Court on appeal, and speaks for itself far more effectively than can counsel. However, to the end that the Court may be made more fully cognizant of appellee's exact position, he offers the following in support of his major premise—the absence of a Federal question.

This case was commenced under Section 14261 of Pope's Digest of the Statutes of Arkansas, which reads as follows:

> "Every telephone company doing business in this State and engaged in a general telephone business shall

supply all applicants for telephone connection and facilities, without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars and five dollars per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for failure to comply with such demand, for such discrimination, after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. Any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same, and the courts shall hear such applications either in vacation or term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith until such orders are vacated by order of the court or judge at chambers, or such suit is finally determined."

Under the clear terms of this statute, appellee must have established two things before he would be entitled to recover the penalties provided; (1) that there had existed, as between himself and others in like situation with him, a discrimination against him practiced by appellant; (2) that upon his demand for service he had complied or offered to comply with the reasonable rules of appellant.

From their very nature, these questions were, and could be only questions of pure fact, the decision of which de-

volved upon, and were conclusively answered by, the jury. This then, is the whole case. The relevant statute quoted above, was never attacked by appellant as being unconstitutional under the Federal Constitution, and for this reason, it may not be said that its validity was sustained by the Arkansas Supreme Court, in the sense as used in 28 U. S. C., Sec. 344 (a) or (b), *supra*. Further, no title, right, privilege or immunity was ever set up by appellant, under the Constitution or laws of the United States, up to and including the final judgment of the Arkansas Supreme Court, in the sense as used in 28 U. S. C., Sec. 344 (b).

The only conclusion possible is that there simply is not any Federal question in this case. It follows that regardless of how impressively formal may be the assignments of error in this regard by appellant, this Court has no jurisdiction to review the judgment. *Zucht* v. *King*, 260 U. S. 174; *Quong Ham Wah Co.* v. *Commsn.*, 255 U. S. 445; *U. S. F. & G.* v. *Oklahoma*, 250 U. S. 111.

It is not entirely clear from appellant's assignment of error or its statement in support of jurisdiction, just what is the basis of its claim of Federal jurisdiction—whether it be because the statute, Section 14261 was held invalid, or because appellant's rule V-c was held unreasonable, or both. In any event, appellant's claim is ineffectual. As pointed out above the discrimination statute was never attacked, and in truth was never even "construed" by the Supreme Court of Arkansas, simply because no construction was necessary. If the Arkansas Court's alleged ruling on appellant's rule V-c be the gravamen of the latter's complaint herein, this, likewise avails appellant naught. Appellant admits (page 1, appellant's Statement in support of Jurisdiction) that the rule V-c is its own rule, and not that of the Arkansas Department of Public Utilities. Therefore, in holding the rule unreasonable (if it did such) the Arkansas court was not invalidating the order of any State legislative body, nor act-

ing in a legislative capacity, since only appellant had made this rule. Further, the Department of Public Utilities did not make the rule its own, but only ordered an impartial enforcement of it. This is the very thing that the jury in the trial court, and the Supreme Court of Arkansas found appellant had not done. Therefore, no repugnance exists between the positions taken by the Arkansas court and the Department of Public Utilities.

A further interesting observation relative to this rule V-c may be made at this point. Appellant has much to say concerning the absence of any notice and hearing afforded it as to the reasonableness of the rule, and hinges thereon its claim of property deprivation. The answer is simple. No notice and hearing was provided, for the reason that none was necessary; the rule was not being, and has never been, attacked by appellee. Indeed, appellee has always offered to comply with this very rule. And here in passing, it might be noted that appellant's cited "due process" cases are accordingly not pertinent in this case. Finally, it is exceedingly doubtful that the Arkansas court did in fact declare rule V-c unreasonable *per se*. And even if it did so, appellee submits that the court's language in that respect is purely dictum, and may therefore not be employed by appellant to support an alleged Federal question so as to confer jurisdiction upon this Court.

Let us see. After quoting the rule in full (140 S. W. 2d 133-134), which requires only that the instrument be located in a place not accessible for public use, the court continues (pp. 134-135): "It is her (appellee's) contention • • • that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a showcase, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree or promise to refuse permission

to use the telephone in a new location, though she did agree to conform with all reasonable rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record * * * indicating * * * a grant of power * * * to the telephone company to exact a promise from her, in addition to the one to abide by the reasonable rules and regulations of the company."

Elsewhere in the opinion, the court finds, as it must have done, that the issue of appellee's offer to comply with the reasonable regulations (including rule V-c) of appellant had been settled in appellee's favor by the jury's finding, as likewise on the primary factual issue of discrimination. It appears therefore, that the court's opinion was based purely on confirmation of the factual question presented to it, and that its holding as to rule V-c was only dictum; and further, even if more than dictum, it is a holding only that the *application*, or unauthorized extension of the rule by appellant was bad, and not that the rule itself is invalid. It follows logically then, that no Federal question is presented or could be presented on this appeal, and that even if by some manner of legal legerdemain such a question could be conjured up, the decision thereof was not essential to the judgment of the Arkansas court.

Appellee cannot too strongly urge upon the sensibilities of this Court this one essential point: That this case was not instituted nor decided on the basis of any rule of service (rule V-c or otherwise), but purely on the theory of *discrimination*, a *factual* concept, which was decided and concluded by the jury. The decision of the Arkansas Supreme Court does not hold otherwise. Accordingly, no Federal question is present here.

But even if for purposes of argument, it be assumed that a Federal question did arise, still, that portion of the Arkan-

sas court's opinion relative to rule V-c is only dictum, and was not necessary to its opinion and decision because the reasonableness of the rule was never traversed. The legal rule in this respect is well settled. It is essential that the decision of the State court *of necessity* involve a determination of the Federal question. It must appear affirmatively that the court could not have decided as it did unless it had decided the Federal question, and that such decision was not in any sense obiter. *Brown* v. *Atwell*, 92 U. S. 327; *Vandalia R. Co.* v. *Indiana*, 207 U. S. 359; *Adams* v. *Russell*, 229 U. S. 353; *Whitney* v. *California*, 274 U. S. 357; *Lynch et al.* v. *New York, ex rel. Pierson*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *S. W. Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

Hand in hand with the foregoing rule relative to dictum, is the rule of equal authority, that if the decision of the State court rests upon non-Federal grounds adequate to support it, this Court will refuse jurisdiction, even though a Federal question be actually involved. *Lynch* v. *New York, ex rel. Pierson, supra; New York City et al.* v. *Central Sav. Bank*, 306 U. S. 661.

So here, even conceding appellant its vainly striven for Federal question (and bear in mind, appellee is nowhere recognizing this), it becomes apparent that the decision of the alleged Federal question was in no way essential to the opinion of the Arkansas court, and also that there existed an adequate non-Federal ground on which to base the court's opinion, i. e., the factual issue of discrimination. How much more tenuous and unreal, therefore, is the suggested jurisdiction of this Court, in view of the fact that there exists herein no Federal question at all.

Another defect: Appellant's supposed bases for the jurisdiction of this Court are shot through with vagueness and non-particularity. The burden of appellant's complaint throughout its assignments of error and statement in sup-

port of jurisdiction, when summed up, amounts to no more than a claim that the Arkansas court erred in not reversing the judgment of the trial court, because the scope and effect of the discrimination statute, section 14261, *supra*, deprived appellant of its property in violation both of due process and equal protection clauses. As hereinbefore observed, it is difficult to ascertain just what appellant is driving at, inasmuch as it skips from section 14261 to rule V-c, and back again, and finally winds up by asserting both. It is plain then, that the constitutional question raised is frivolous, unsubstantial, indefinite and fictitious, and thus presents no question for this Court's consideration. *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86.

Finally, sweeping aside the requirements that there be a Federal question; that it be substantial, that it must necessarily have been decided by the State court; and sweeping aside the requirements of 28 U. S. C. Sec. 344 (a) and (b), appellee submits that this question, whatever be its nature, this *thing* appellant relies upon, has been set up too late. To urge upon this Court a jurisdiction based upon a question raised for the first time in its petition for rehearing to the State Supreme Court, is but the last gasping effort of an unwilling litigant to avoid answering for its mistaken policies. If appellant conceived the existence of a Federal question in this case, the time to have asserted it was at the trial of this case in circuit court. Appellee brought his action under Section 14261. Rule V-c was not in his mind in connection with this suit save that he had offered to comply with it, as he must have done under the statute. Why, therefore, did not appellant complain then of the statute? Confronted with such an action, why did not appellant then assert its Federal question? Why? Because no Federal question existed; because no construction of this statute was contemplated or was necessary; because no Federal question has ever existed in this case. To come

now and invoke the jurisdiction of this Court, on the ground that there exists a Federal question, when appellant never thought of such a thing until its petition for rehearing in the Arkansas Supreme Court, is in itself, almost a confession of "no jurisdiction". *Consolidated Turnpike Co.* v. *Norfolk*, 228 U. S. 326; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *St. Louis, etc. R. Co.* v. *Shepherd*, 240 U. S. 240.

Appellee would at this point beg the Court's indulgence for the length and formal unorthodoxy of this statement against jurisdiction, and motion to dismiss the appeal. But appellant's pleadings and papers herein are so involved and so adroitly worded that it is incumbent upon counsel for appellee to answer a number of appellant's statements and assertions, in order, not only that appellee's cause be well and truly advocated, but also that this Court may not be misled by suavity of language or subtlety of innuendo.

On page 2 of appellant's statement in support of jurisdiction, it is stated that the plaintiff (appellee here) demanded semi-public telephone service at the rate provided for the more restricted customer classification—the latter being the type of service to which rule V-c would apply. This statement is wholly and absolutely incorrect. Let the record speak in answer to this assertion of appellant (R. 2, 3, 4). The only type of service ever requested by appellee was that type variously denominated as "customer service", or "straight or regular business telephone service" at the lawful rate of $3.50 per month. Appellee has never requested that service be provided him at less than prescribed rates.

On page 3 of appellant's Statement, it is asserted that plaintiff's claim at the trial was that because other persons were receiving semi-public service at the lower customer service rate, he too was entitled to such service, and

that appellant's refusal to "violate the Utilities Act in his case" subjected appellant to the penalties of Section 14261. This assertion is likewise wholly and absolutely untrue. While it may well be that such a situation was a discrimination in fact against appellee, such was not relied upon by appellee nor ever advanced by him in support of his action. The whole theory of appellee's case was that he had been unlawfully discriminated against because appellant had failed and refused to furnish him with *any service whatsoever*, whereas others in like situation with him were given service. Never, at any time did appellee demand that appellant violate the Utilities Act in his favor by extending to him standard service at a less-than-legal rate.

It was upon this theory of appellee's case that the jury found discrimination and upon which the Supreme Court of Arkansas affirmed the judgment below. Appellant would have this Court believe that the case was affirmed because the Arkansas court held rule V-c unreasonable upon collateral attack. Appellee has hereinbefore demonstrated the transparency of this argument. Here was no collateral attack. The plain truth is that penalties were assessed against appellant, not because the rule was or was not unreasonable, but because appellant had been guilty of discrimination, wholly dehors the rule. The alleged collateral attack is non-existent, for the reason that no attack was ever made upon the rule at any stage of the case. The remarks of the Arkansas Supreme Court, though perhaps richly deserved by appellant, were no more than that tribunal's opinion about something which was not before it—in short, its language is dictum.

Throughout appellant's Statement, it makes its specious appeal to the sympathy of this Court. According to appellant, if it abides by Section 14261, in order to avoid penalties thereunder, it must perforce subject itself to liability for violation of the Public Utilities Act (Pope's Digest,

Sections 2121-2124); or, if it complies with the Public Utilities Act it thereby makes itself liable for penalties under Section 14261. The fallacy of appellant's argument is readily discernible. It has already received judicial condemnation, by the Arkansas Supreme Court, which held categorically that there is no repugnancy between Section 14261 and the Public Utilities Act. (*S. W. Bell Tel. Co.* v. *Matlock*, 195 Ark. 168.) Secondly, as a matter of logic, if, as appellant insists, rule V-c has been declared unreasonable, appellant is *ipso facto* relieved of the necessity of enforcing it, and could not, in the nature of things, be punished under the Public Utilities Act for failure to enforce a void rule. Thirdly, it must be remembered that violations of the Public Utilities Act constitute matter for adjustment as between the State and the offending utility, whereas violations of Section 14261 constitute matter for adjustment as between the individual wronged by the violation (discrimination) and the utility. That a discrimination might be practiced by a telephone company which would be unlawful under Section 14261, and the company yet be perfectly within the bounds of the rules set by the Public Utilities Act is a proposition so plain and simple as to be apparent to a six-year old. Thus, appellant's "anomalous and inequitable" proposition is revealed in its true light as no more than the product of its own devious but none the less spurious logic.

In point of fact, this ruse of appellant's being discovered and set at nought, its whole claim to this Court's jurisdiction falls to the ground like paw-paws after frost. For, under appellant's theory, Section 14261 was "construed" by the Arkansas Supreme Court so as to produce the result contended for by appellant above. If no such construction was in fact made (and it could not have been so made) then the appeal to this Court's jurisdiction of necessity fails.

Appellant cites and relies upon *S. W. Tel. & Tel.* v. *Danaher*, 238 U. S. 482. The company rule in that case was that service could be refused and no discount allowed for paying bills promptly, if the subscriber was in arrears on his telephone bill. The Supreme Court of Arkansas held this rule unreasonable. But in the cited case, the company was denied the right to prove or seek to prove non-compliance, on the part of the plaintiff, with this rule, which was certainly error. In the case at bar, no such element appears. Appellant was left free and unhindered to put all the proof at its command before the jury that appellee did not comply or offer to comply with rule V-c. The result, as determined by the jury was that appellee had offered to comply with this rule, and therefore no error can be predicated upon this basis, as there was in the *Danaher* case, *supra*. Furthermore, the emphasis placed by this Court upon the then statutory penalty of $100.00 per day leads to the permissible inference that one not inconsiderable element of this Court's disapproval lay in the severity of the penalty. The statute now in effect, Section 14261, provides for a penalty of $5.00 per day.

It should be noted further that this *Danaher* case, after having gone twice to the Arkansas Supreme Court, and once to this Court (*supra*), found its way once more to the Supreme Court of Arkansas. *Danaher* v. *S. W. Tel. & Tel. Co.*, 137 Ark. 324. There, pursuant to the mandate of this Court, the Arkansas court remanded to the circuit court for a new trial. Complaint was filed, alleging facts relied on to establish discrimination, under the predecessor of Section 14261, and alleging, also pursuant to the statute, compliance with defendant's reasonable regulations. Defendant's demurrer to the complaint was sustained and plaintiff appealed. The Arkansas Supreme Court said (p. 331): "Neither this court nor the Supreme Court of the United States has yet declared the statute unconstitu-

tional, upon the state of facts alleged in the complaint, the truth of which the demurrer admits." The court then reversed the judgment and remanded to the trial court with directions to overrule the demurrer.

So here, in the case at bar, appellee's complaint simply set up facts which he claimed constituted discrimination and alleging his offer of compliance with the reasonable rules of appellant company. Upon issues joined, and trial had, the jury found for appellee on these purely factual questions. In such a state of the record, how can it be seriously urged that a Federal question was presented or that such a question must have been decided by the Supreme Court of Arkansas in affirming the judgment?

Appellant would next, on page 10 of its Statement, have this Court believe that in any event, appellant was deprived of property without due process of law, since this case is governed by *S. W. Tel. & Tel.* v. *Sharp & White*, 118 Ark. 541, and that the Arkansas court did not follow this case. It has always been appellee's understanding that a court of last resort is the most competent judge of its own decisions, as to their relevancy and applicability to later cases. Perhaps appellant is introducing a new theory into appellate practice by suggesting that courts of last resort should not be permitted to construe their own opinions and decisions, but should in a given case yield to the persuasions of counsel.

Again, this case does not present a question of permitting appellant to mend its ways (a confession of past guilt), as contended by it on page 11 of its Statement. The question in this case is one of liability for penalties for an unlawful discrimination knowingly and systematically pursued.

Appellant next asserts, on pages 11-12 of its Statement that appellee was offered the service requested at the legal rate therefor, but that he refused it, and that the Arkansas

Supreme Court's decision in effect holds that appellee need not have complied with appellant's reasonable regulations. Further, that penalties were assessed against appellant before the Arkansas Supreme Court found that other customers of appellant were violating their contracts with appellant; and that if this be true, there was no evidence that appellant knew of such violations. Appellee's answer to these erroneous propositions of appellant's is simple and is sustained by the record. Despite appellant's claim as to the kind of service offered appellee, the fact remains that he was denied legal service of any kind at any rate, even though he had offered to comply with appellant's rules. As for appellant's interpretation of the Arkansas court's opinion on the question of compliance, this decision does not and could not hold as appellant says. The whole basis of appellee's case is that he must have complied or offered to comply with the appellant's reasonable regulations. The jury found that he had so offered to comply. This question is therefore rendered moot.

Again, while it may be true that the evidence incidently disclosed that other customers of appellant were violating their contracts, this fact signifies nothing. Penalties were assessed against appellant because it had failed and refused to furnish appellee with any service at all, while others like him were served. Herein lay the discrimination. Appellant further claims that it did not know of such violations by its other subscribers, and that there was no evidence, other than that each witness who was a subscriber was shown to have been a subscriber of several years' standing. In such a situation, with appellant rendering them continuous service, maintaining their lines, and collecting their rentals, appellant's assertion in this respect is a *reductio ad absurdum* of legal and logical reasoning, and avails it nothing.

Summary and Conclusion.

To the end that this Court may be left with the clearest understanding of appellee's position, he concludes his necessarily lengthy Statement against Jurisdiction, and Motion to Dismiss, with a summary of his principal grounds therefor:

1. No Federal question of any kind was or is present in this case, since it involves only questions of fact already concluded by the jury at the trial of the case, and affirmed by the Supreme Court of Arkansas on that basis; therefore, no jurisdiction exists in this Court, no matter how invoked.

2. None of the requisites of either 28 U. S. C. 344 (a) or (b) is present in this case, therefore, no jurisdiction exists in this Court on review.

3. Even if a Federal question were presented in this case, the decision of the Supreme Court of Arkansas herein did not, of necessity, require a determination of such Federal question, and accordingly, under the general and well-settled rule, no jurisdiction for review exists in this Court.

4. Further, since the language of the Supreme Court of Arkansas relied upon by appellant herein as setting up the alleged Federal question was and is only *obiter dictum*, and not essential to the decision of this case by said Court, it follows, under the accepted rule, that no jurisdiction for review exists in this Court.

5. Inasmuch as there was in this case an adequate non-Federal ground upon which the decision of the Supreme Court of Arkansas could have been, and was based, it follows that, under the general rule, no jurisdiction for review exists in this Court.

6. Finally, that even though appellant be conceded its Federal question, which appellee does not, since it affirma-

tively appears from the record and judgment herein that the alleged Federal question was not raised by appellant until after the final judgment of the Supreme Court of Arkansas, it follows, under the general rule, that appellant has not asserted the existence of a Federal question and consequent jurisdiction of this Court, at the proper time, and therefore no jurisdiction for review exists in this Court.

WHEREFORE, the foregoing premises considered, appellee respectfully moves that the appeal herein be dismissed by this Honorable Court.

Dated July 15, 1940.

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